BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRIDGET C. COZAD	)	
Claimant	)	
VS.	)	
	)	Docket No. 169,966
THE BOEING CO - WICHITA	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund (Fund) appeals from an Award entered by Administrative Law Judge Nelsonna Potts Barnes on September 30, 1997. The Appeals Board heard oral argument April 1, 1998.

APPEARANCES

The claimant neither appeared in person nor by her attorney. Respondent and its insurance carrier appeared by attorney Vaughn Burkholder of Wichita, Kansas. The Fund appeared by its attorney, Orvel Mason of Arkansas City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant and respondent have settled. At the settlement hearing, respondent reserved all issues between respondent and the Fund. The sole issue on appeal is whether the Fund is liable for all or any part of the amounts respondent paid claimant. The Fund contends there can be no Fund liability because claimant alleged only one date of accident and settled the claim based on one date of accident. Respondent, on the other hand, contends the evidence shows claimant suffered two repetitive trauma injuries, both resulting in carpal tunnel syndrome. The first injury ended in May of 1992. Claimant received treatment and was off work until mid-June 1992. Claimant returned to work with restrictions but suffered a second repetitive trauma injury, a permanent worsening of the carpal tunnel syndrome. On those facts, respondent argues the Fund should be liable for the benefits attributable to the second injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award shall be affirmed.

FINDINGS OF FACT

(1) In her application for hearing, claimant alleged her normal work activities caused injury to both her right and left arm on March 28, 1992. The record indicates March 28, 1992, was the approximate date the symptoms began.

(2) Claimant began working for respondent in 1983. She started in sheet metal assembly, did some electrical work and some mechanic work.

(3) In 1992, Claimant began having problems with her hands and arms. She reported the problems in her right hand on April 28, 1992, and indicated she had been having the problems for about a month. She testified she was having bilateral problems but the right was much worse.

(4) Claimant received treatment for this injury from both Dr. Lawrence R. Blaty and Dr. Harry A. Morris. Claimant was given physical therapy and was off work for a brief period. According to Dr. Morris's records, she was off from May 12 to June 23, 1992. When Dr. Morris released her, he limited her to drilling no more than four hours per day and to no riveting.

(5) Based on the release from Dr. Morris, claimant returned to modified work. She cleaned parts, did some clerical work, and continued to do some drilling. Her symptoms worsened until she had surgery in December 1992. Claimant has not been able to return to work for respondent since the surgery.

(6) Dr. Blaty, who had seen claimant shortly after her problems began in April 1992, saw claimant again on December 3, 1993. Dr. Blaty opined that claimant has a 17 percent

impairment to the left upper extremity and a 14 percent impairment to the right. He combined the two ratings to arrive at a whole body impairment of 17 percent. Dr. Blaty also testified that 50 percent of claimant's impairment existed in April and May of 1992. The remaining 50 percent he attributed to work activities after that date.

(7) Dr. Kenneth D. Zimmerman, Boeing Central Medical physician, agreed with Dr. Blaty's opinion that 50 percent of the impairment existed as of April 28, 1992, and that the remaining 50 percent occurred after claimant returned to work in June of 1992.

(8) Dr. Morris rated claimant's impairment as 10 percent to each hand. Dr. Morris concluded claimant's impairment did not worsen after June 1992.

(9) Claimant and respondent settled the claim at a hearing held March 8, 1994. The settlement was based on a 40 percent disability. At the settlement hearing, March 28, 1992, was used as the date of accident. Respondent paid a lump sum of $50,000 for a 40 percent permanent partial general bodily disability. Respondent had also paid $17,629 in temporary total disability benefits for the period December 10, 1992, through February 9, 1994; $6,969.77 in vocational rehabilitation services; and $13,353.98 in medical expenses. At the settlement hearing, respondent reserved all issues between respondent and the Fund. The Special Administrative Law Judge advised the claimant that the settlement resolved all liability for any injury claimant may have had at respondent.

(10) The Board finds claimant had two accidents, one a series ending May 12, 1992, when she first left work, and the second a series from June 24, 1992, through December 10, 1992.

CONCLUSIONS OF LAW

(1) Under the law applicable at the time of claimant's accidents, the Kansas Workers Compensation Act shifted liability for injuries to handicapped employees under certain circumstances. If the employer knowingly employed or retained a handicapped employee and that employee later suffered an injury which was caused or contributed to by the handicap, the Fund is liable for all or a part of the benefits. K.S.A.1991 Supp. 44-567.

(2) The Fund is liable for all of the benefits if the disability would not have occurred but for the preexisting impairment. K.S.A. 1991 Supp. 44-567.

(3) If the disability would have occurred regardless of the preexisting impairment, but the resulting disability was contributed to by the preexisting impairment, the Fund is liable for the proportion of the award attributable to the preexisting impairment. K.S.A. 1991 Supp. 44-567.

(4) The Board finds that when claimant returned to work in June of 1992, she was a handicapped employee as defined in K.S.A. 44-566. The term "handicapped" is there

defined to include any impairment which would constitute a handicap in obtaining employment. When she returned to work, claimant was unable to do the job she had been doing because of restrictions imposed.

(5) Respondent retained claimant with knowledge of the impairment which constituted the handicap. Respondent knew of the restrictions and accommodated those restrictions.

(6) Based on the opinions of Dr. Blaty and Dr. Zimmerman, the Board finds claimant suffered a second accident, after she returned to work in June of 1992, which would not have occurred but for the preexisting handicap. Her condition permanently worsened and required surgery. The Fund is, therefore, liable for the benefits due for the second injury. K.S.A. 1991 Supp. 44-567.

(7) Contrary to the Fund's assertion, the Board concludes the settlement hearing of March 8, 1994, was intended to settle claims for any injury prior to the date of the settlement. The settlement amount was based on the total disability.

(8) Under the circumstances presented in this case, the fact that the settlement between claimant and respondent was based on one date of accident does not prevent respondent from seeking to impose liability on the Fund by establishing the injury resulted from two accidents with dates different from that alleged by the claimant. The settlement between claimant and respondent settled any and all injuries claimant sustained with respondent through and including the surgery performed in December of 1992. Respondent reserved, and did not settle, the issues between respondent and the Fund. Respondent then introduced evidence tending to show two accidents, one through May 1992 and the second after claimant returned to work in June 1992.

The Fund argues respondent should be bound by the date of accident used at the settlement hearing. According to the Fund, respondent should have specifically reserved the dispute as to the date of accident at the time of the settlement hearing. The Board agrees this would have been better practice. But the record discloses no prejudice to the Fund. The Fund has had a full opportunity to, and did, defend against respondent's claim. The dates of accident used for purposes of respondent's claim against the Fund should conform to the evidence. Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

(9) For the first accident, the Board finds respondent is liable for all benefits due to on June 24, 1992, when claimant returned to work. Since the second accident, from June 24, 1992, through the last day worked in December of 1992, would not have occurred but for the first, all of the benefits due for the second accident should be paid by the Fund. K.S.A. 1992 Supp. 44-567.

(10) Claimant and respondent settled based on a 40 percent disability. The evidence in this case, principally the functional impairment ratings, indicate and the Board finds the

40 percent was a work disability. Although respondent reserved all issues, both respondent and Fund have tried this case on the apparent assumption that the 40 percent was reasonable: the only issue tried was the extent of liability, if any, each had for that 40 percent. The Board finds the 40 percent reasonable and will apportion liability based on the amount paid in settlement, including medical, temporary total disability, and vocational rehabilitation benefits.

(11) The ALJ ordered respondent to pay for 8.5 percent of the total 40 percent disability and ordered the remaining 31.5 percent to be paid by the Fund. She also ordered respondent to pay for medical expenses through June 23, 1992, and ordered the Fund to pay all other medical, temporary total, and vocational rehabilitation benefits. Although the Fund asserts it has no liability, neither party contests this apportionment if there is liability. The apportionment is based on Dr. Blaty's opinion that claimant has a 17 percent whole body functional impairment with one-half, or 8.5 percent, whole body impairment attributable to the first accident. The second accident is then considered responsible for the fact claimant was not able to continue with the same job and the work disability is attributed to the second accident running from June 24 to December 10, 1992. The Board approves and adopts this apportionment of the liability.

(12) Respondent is liable for all medical treatment and temporary total disability benefits through June 23, 1992. The Fund is responsible for all medical treatment, temporary total disability, and vocational rehabilitation benefits after June 23, 1992.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Nelsonna Potts Barnes, dated September 30, 1997, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD APPORTIONING LIABILITY BETWEEN THE RESPONDENT AND ITS INSURANCE CARRIER AND THE KANSAS WORKERS COMPENSATION FUND IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS. Respondent's liability is limited to the value of an 8.5 percent disability with the remaining liability for permanent partial disability being the responsibility of the Kansas Workers Compensation Fund.

Respondent will pay all medical compensation up through and including June 23, 1992, the date of claimant's release and return to work following treatment. All medical expenses incurred, temporary total disability payments, and vocational rehabilitation payments incurred after June 23, 1992, shall be the responsibility of, and paid by, the Kansas Workers Compensation Fund.

The Board approves and adopts all other orders in the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Vaughn Burkholder, Wichita, KS
Orvel Mason, Arkansas City, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director